IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-545

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER UNITED AIR LINES, INC.

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I.

RESPONDENT'S ARGUMENT ACCORDS NO SIGNIFICANCE TO THE TRIAL COURT'S DENIAL OF CLASS ACTION STATUS ON THE QUESTION OF TIMELINESS OF INTERVENTION.

Our position is that the trial court did not err in denying respondent's October 1975 petition to intervene as untimely since respondent had been excluded from the case in December 1972 when class status was denied. We rely on *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 561 (1974), which held that the limitations period is tolled upon filing of a class action but "only during the pendency of the motion to strip the suit of its class character."

Respondent replies that our reading of *American Pipe* is "skewed," and that—

> [T]he correct rule after *American Pipe* is that when, as here, an appeal from the final decision results in reversal of the unfavorable class ruling, the statute of limitations remains satisfied for the class by the timely commencement of the class action as though the class had been correctly permitted by the District Court. (Resp. Br. 20.)

We submit that respondent's position is completely circular. The issue is whether respondent was a party entitled to appeal the adverse class ruling—*i.e.*, should the Court of Appeals ever have reached the issue of class denial on respondent's appeal. Respondent's formulation assumes she had the same standing to appeal the adverse class decision three years after she was excluded from the case as would the named plaintiffs and intervenors if they had not settled their claims but had obtained judgment against defendant in October 1975.

Respondent's rule, in fact, makes the question of timeliness and time limits irrelevant. If it be assumed that the Court of Appeals could examine the class question without regard to the status of respondent, then the issue of timeliness would never be a factor. If class denial was correct then putative class members are out of the case for that reason; if class denial is held to be error, then the class is reinstated. Thus the potential class member could appeal the class denial without regard to timeliness of attempted intervention or his or her status as a party.

In short, respondent contends that even though denial of class status in December 1972 "excluded me and others like me from this action" (McDonald Affidavit, A. 95), nonetheless her right to appeal from the class denial upon final disposition three years later persisted as though she were still a party to the action.

The Court of Appeals certainly did not apply respondent's "rule." The Court first examined as an independent issue the timeliness of respondent's petition to intervene in October 1975. We believe the majority decided that question incorrectly by

assuming, contrary to *American Pipe*, that tolling continued after the denial of class status. The point is fully discussed in our main brief, pp. 12-15.

It was only after deciding the question of the timeliness of intervention that the majority concluded it could examine the trial court's decision on class status:

> Because petitioner [respondent here] was entitled to be an intervenor and filed a timely notice of appeal from the final order terminating the litigation, we have power to examine the adverse class ruling. . . . (Court of Appeals Opinion, A. 109.)

Judge Pell in dissent concluded that the petition to intervene was not timely and was properly denied, and concluded, "Since, in my opinion the timeliness issue is dispositive of this case, I have not deemed it necessary to advert to the other issues raised on this appeal." A. 115.

Respondent turns the analysis on its head. She justifies the majority decision on timeliness because of its decision on class. But the Court had to find timeliness before it could reach the class question. The majority, we contend, was wrong on the timeliness question, but at least it proceeded in the proper sequence.[1]

Neither *Burnett* v. *New York Central Rr. Co.*, 380 U. S. 424 (1965), (Resp. Br. 20, 23), nor *Esplin* v. *Hirschi*, 402 F. 2d 94 (10th Cir. 1968), *cert. denied* 394 U. S. 928 (1969), (Resp. Br. 19, 22), supports the "rule" urged by respondent.

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1. In *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F. 2d 501 (3d Cir. 1976), intervention was denied individual white firemen in a Title VII class action suit brought by a group of black firemen. The unsuccessful intervenors then appealed both the denial of intervention and the merits of the trial court's final order covering hiring and promotion. The Court of Appeals upheld the denial of intervention as untimely since the petition to intervene was filed 16 days after the final order. The Court then held that since the intervention was properly denied, the merits of the trial court's order could not be reached. ". . . One properly denied the status of intervenor cannot appeal on the merits of the case [additional citations omitted]." 530 F. 2d at 508.

The filing of an action in the state court in *Burnett* was held to toll the limitations period under the Federal Employers' Liability Act. This was not a class action and the Court noted that "Petitioner did not sleep on his rights but brought an action within the statutory period in a state court of competent jurisdiction." 380 U. S. at 429. *Burnett,* in fact, cuts against respondent. The Court considered the purpose of limitations statutes as being primarily designed to assure fairness to defendants. "Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." 380 U. S. at 428.

The comment of the trial judge here in denying respondent's petition to intervene is precisely to that point:

> Well, in my judgment, gentlemen, this is five years now this has been in litigation, and this lady has not seen fit to come in here and seek any relief from this Court in any way during that period of time, and litigation must end. I must deny the motion. (A. 101.)

In *Esplin* the Court of Appeals examined the propriety of class relief on the appeal of Hirschi, the named plaintiff. We agree that named plaintiffs may appeal class denial after final judgment if they have not waived that right by settling their claims. Pet. Br. 15. It follows that if the appeal is successful, the class is reinstated. *Esplin* so holds—but that is not the issue here. The issue here is the right of a non-party to start again a lawsuit settled by the named parties and intervenors in order to get relief which is otherwise barred by the statute of limitations.

Respondent argues that intervention after judgment for purpose of appeal is "an old and well-established procedural device." Resp. Br. 15. The contention is beside the point. The cases cited by respondent concerned intervention as of right under Rule 24(a). Intervention here, if possible at all, would have to be permissive under Rule 24(b), as the Court of Appeals recognized. A. 106. The final order of dismissal did not affect Ms. McDonald's interest with respect to the issue of the legality of

the no-marriage policy, since that had been decided in *Sprogis* and was no longer a contested issue in *Romasanta,* the case here.

The interest which Ms. McDonald sought to protect by her intervention and appeal here was the right to obtain a remedy within the framework of this litigation after she had delayed her attempt to intervene for three years after class denial. That she may lose the right to a remedy because of the passage of time is not the kind of interest she is entitled to protect through appeal from the final order of dismissal which simply ratified the settlement of claims of named plaintiffs and timely intervenors.[2] What she really seeks is classic "one-way intervention," which the amendments to Rule 23 were designed to eliminate. *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 547 (1974).

Had respondent petitioned to intervene at the time of class denial she could have urged the trial court to modify the order on class status and, if unsuccessful, could have appealed the denial of intervention.[3] The trial judge pointed this out during hearing on the petition to intervene in October 1975. "She never even sought to appeal that order [of December 6, 1972, denying class status]. She never sought to come in at any time and ask for a modification." A. 100.

We do not understand the significance of respondent's reference to the "Erlenborn substitute" rejected by the Senate in 1972. Resp. Br. 30. If adopted, requirements for class actions

2. "The district court order dismissing the litigation, pursuant to the terms of the stipulation did not prejudice the rights of individuals [potential class members] who were not parties to the litigation at the time of dismissal." *Pearson* v. *Ecological Science Corp.,* 522 F. 2d 171, 177 (5th Cir. 1975), cert. denied 425 U. S. 912 (1976). Charges of "sell-out" because of settlement after class denial were also made in *Pearson.* The Court held that named plaintiffs had no fiduciary duty to potential class members after class denial. *Pearson* is more fully discussed in our main brief, pages 13-16.

3. An order denying intervention is final and appealable. *EEOC* v. *United Air Lines,* 515 F. 2d 946-48 (7th Cir. 1975).

under Title VII would have been more restrictive than under Federal Civil Procedure Rule 23. That it was rejected only means that the requirements of Rule 23 are still applicable in Title VII cases.

American Pipe "involve[d] an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts." 414 U. S. 538, 540. It held that the applicable limitations period was suspended for all potential class members on the filing of a class action but "only during the pendency of the motion to strip the suit of its class action character." Eleven days of the statutory period remained after denial of class, and the motions to intervene were filed on the eighth day. ". . . [I]t follows that the motions were timely." 414 U. S. at 561.

This must mean that if the motions were filed on the twelfth day they would not have been timely. There is no other reading possible. It establishes a clear rule, easily administered by the district courts as they struggle with the difficulties presented by class actions.[4]

4. Respondent repeatedly refers to petitioner's "novel tolling principle," "United's rule," and "United's draconian rule." Resp. Br. 13, 20, 25, 26, 29, 32, 34. We had thought the principle advocated in our brief was clearly implied in *American Pipe* and not a rule of our making. "The holding in *American Pipe* cuts both ways." *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F. 2d 1073, 1078 (10th Cir. 1975). "Under *American Pipe*, the intervention does not relate back to the date of original filing by analogy to cases under original Rule 23 brought as 'spurious' class actions, and the petition must be filed within the remaining time under the statute of limitations measured from the date of the order denying certification." 3B Moore, Federal Practice (1976-77 Supp.) ¶ 23.90 at 173. See also *Pearson* v. *Ecological Science Corp.*, 522 F. 2d 171, 178 (5th Cir. 1975), discussed at Pet. Br. 13-16. The federal trial court in the Southern District of New York recently adopted a similar reading of *American Pipe*. *Stull* v. *Bayard*, 75 Civ. 3782 (January 7, 1977). Since the decision is not reported, we quote at some length (Slip Opinion 12-14):

> [Plaintiff] is not within the *American Pipe* principle of tolling. He did not move (timely or not) to intervene in the then

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Despite the tremendous burdens which class actions have placed upon the judiciary and upon defendants who become embroiled in such litigation, respondent McDonald asks the Court to adopt, as a general rule of law applicable in class actions, the principle that once a class action pleading is filed, potential class members may attempt to resuscitate the class action at any time, even though the class status has been denied years before their tardy attempts to intervene, even though years of litigation

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> pending second Lillian action after class action status had been denied to that action. [Plaintiff] went counter to and defied the *American Pipe* principle by commencing a separate and independent action, thus increasing the volume of federal litigation and defeating the economy and efficiency which it was the object of the present class action Rule 23 to bring about.
>
> There is no square authority on the point, but in my view a member of a class, on whose behalf a class action has been commenced, may not bring a separate, independent action after his individual claim has been time barred. *His sole remedy, under American Pipe, is a timely motion to intervene in the class action after class action status has been denied;* only if he does so, is the statute of limitations tolled as to him.
>
> * * * * *
>
> . . . There is nowhere in [*American Pipe*] any suggestion that a separate independent action by a class member could be maintained. The opinion emphasized that its interpretation of the class action Rule 23 was "necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve" (414 U. S. at 558). It certainly would not effectuate "litigative efficiency and economy" to permit any number of separate independent actions by class members on time-barred claims. The separate opinion of Mr. Justice Blackmun points out that the *American Pipe* principle will not unduly encourage the assertion of stale claims because these can only be asserted through intervention either as of right or as an exercise of the Court's discretion and that the *American Pipe* decision does not "necessarily guarantee intervention for *all* members of the purported class." 414 U. S. at 561. (Emphasis supplied.)

Whether or not one may alternatively file an independent action after class denial is not at issue here; the point is that immediate legal action is necessary after class status is denied.

have interposed, and even though the litigation has terminated to the satisfaction of all parties actually involved.

We submit that respondent's view is inconsistent with Rule 23, clearly contrary to the principles set forth in *American Pipe* and, if adopted, would hopelessly confuse and complicate the management of litigation under Rule 23.[5]

II.

RESPONDENT'S ATTACKS ON PETITIONER'S MOTIVES, CONDUCT AND ARGUMENTS ARE NOT SOUND.

Respondent's brief is replete with inaccuracies and innuendoes concerning petitioner's motives, conduct and arguments. These are in the main irrelevant to the issues before the Court. Although mindful of the Court's concern about undue proliferation of written material submitted to it, we are compelled to respond to some of these comments lest our failure to do so be taken as admissions.

1. The Right of Named Plaintiffs to Appeal Class Status Denial.

Respondent contends the named plaintiffs could have appealed the final order of dismissal, and disputes petitioner's contention that because of the settlement and agreed order of

5. As we have elsewhere noted (Pet. for Writ of Cert. 8, n.6), the Court of Appeals test of timeliness (which differs from that now advanced by respondent, *supra,* pp. 2-3) is equally unworkable. That makes the running of the limitations period dependent on the subjective state of mind of the potential class member attempting to intervene as to his or her expectations of plaintiffs' intent to appeal after final order. This test invites a separate judicial inquiry into such questions as the intervenor's knowledge of the proceedings, when the intervenor may have first learned of plaintiffs' intent, and whether the intervenor's conclusion was reasonable in light of peculiar factors such as the denial of attorney fees in *Sprogis.* See Pet. Br. 20, n.18. This approach would also mean that intervention might be timely for some potential class members and not for others because of varying experiences and expectations.

dismissal named plaintiffs could not appeal.[6] Resp. Br. 27, n.27. Respondent suggests there was really no settlement, and erroneously states that the Special Master who recommended a monetary award in *Sprogis* participated in the monetary awards in this case. Resp. Br. 10. The order of October 3, 1975 dismissing the case states "counsel for the parties in this case negotiated settlements of the claims of [named plaintiffs and intervenors]." The order then stated that the complaints of these parties "are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved." The complaint of one other intervenor was dismissed with prejudice, and that was based on that intervenor's motion for leave to withdraw and waive any claim to relief. A. 91, 92. Respondent quotes counsel for the named plaintiffs and intervenors to the effect that he believed plaintiffs could thereafter have appealed, "but have chosen not to do so." Resp. Br. 27, n.27 What is omitted is counsel's further statement to the trial court: "They have settled their individual claims and consequently the original class action representatives are not in a position to take the appeal." A. 100-1.

We simply do not understand how respondent has the temerity to state that the Special Master participated in the process, that this was not a settlement, and that the named plaintiffs could appeal after agreeing to an order of dismissal with prejudice.[7]

6. On our view of the case, whether named plaintiffs could have appealed class denial and chose not to do so, or could not have appealed because of the settlement and agreed dismissal with prejudice, is irrelevant here. In either case, respondent would not have the right to appeal class denial since the statutory period had long since run as to her. The difference is critical to respondent, however, since she defends her lack of earlier action on the ground she was relying on an expectation that named plaintiffs would, and therefore could, appeal.

7. In the text and footnote 30 on page 29 of her brief, respondent cites a number of cases to the proposition that a named plaintiff may appeal an "adverse class determination" even where the plaintiff has "no personal claim or has received full satisfaction." The cited cases do not support the proposition. They involve rather

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2. The No-Marriage Policy.

Respondent states that "although this discriminatory 'no-marriage' policy became unlawful in 1965 on the effective date of Title VII of the Civil Rights Act of 1964 . . . United retained the rule until November, 1968." Resp. Br. 4. The clear implication is that United deliberately persisted in a policy it knew to be a violation of Title VII for three years after the policy became unlawful. We accept, as we must, the decision of *Sprogis* v. *United Air Lines*, 444 F. 2d 1194 (7th Cir. 1971), that the no-marriage policy was a violation of Title VII and the propriety of that ruling is not in issue here. However, the violation was not as obvious as respondent implies. The *Sprogis* decision was by a divided court, with Judge (now Justice) Stevens agreeing with United's position that the discrimination inherent in the no-marriage policy was based on marital status—not proscribed by Title VII—and not on sex. In January of this year the Court of Appeals for the Fifth Circuit held that the Delta Air Lines no-marriage policy for flight attendants was not a violation of Title VII precisely on the grounds articulated by Judge Stevens. In so doing the Fifth Circuit expressly rejected the reasoning of the majority in *Sprogis*. *Stroud* v. *Delta Air Lines*, 544 F. 2d 892, 894 (5th Cir. 1977). Thus, there is now a split between the Fifth and Seventh circuits on the basic issue of whether the no-marriage policy was ever a Title VII violation.

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efforts of a class representative to appeal the denial of relief to unnamed class members where a class has been certified or situations in which class has been denied solely because the class representative may not be entitled to relief. Typical is *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976), cited by respondent at pages 14, 27 and 29. There the Court held that an appeal challenging denial of relief to the unnamed, but identifiable, class members by the class representative was not moot because the class representative himself might not have been entitled to relief. There the class was certified, there was no settlement, and the issue was mootness, not standing to appeal.

3. Petitioner's Failure to Consolidate.

United's defense of the various suits brought against it by individual flight attendants is criticized as its "herculean efforts to escape its obligations to respondent McDonald and others similarly situated." Resp. Br. 2. United is faulted because it did not attempt to transfer and consolidate similar claims "from members of a numerous class." Its defenses are described as "technical" and its successes as "procedural". Resp. Br. 2, n.1, 3. We were not aware that United had the obligation to concede the validity of class allegations or to move to consolidate individual suits. The question really suggested by these various suits is why other flight attendants were not as sanguine as was respondent here about asserting their own interests and why they did not—as did Ms. McDonald—simply wait for seven years before coming forward. It was respondent's own inaction—not United's "herculean effort"—which is responsible for her present situation.

4. The Claimed Class.

Respondent takes some liberties in describing the number of members in the alleged class. At page 4 of her brief, it is "estimated" to be over 160. At page 14, there are "over one hundred and sixty women who were the victims" of the no-marriage policy. In support of this number, respondent refers to a statement in the majority opinion that "Petitioner and 140 other stewardesses were thus excluded from the case." Respondent ignores the court's footnote to this statement: "The figure is derived from p. 2 of petitioner's [respondent here] main brief and p. 13 of the EEOC's brief and *may be excessive*. Defendant asserts there are only 30 in this class (defendant's main brief 50)." A. 105, n.2. (Emphasis added.) When faced with the same overstatement in the Court of Appeals we pointed out that respondent based her estimate on a computer printout

given to named plaintiffs during discovery for the period January 1966 through December 1971 showing terminations of flight attendants for all reasons, not solely marriage. Respondent persists in this overstatement, citing as authority the Court of Appeals opinion which, in turn, is based on respondent's own inaccurate statement.

Elsewhere in her brief respondent argues that the surprise and prejudice to a defendant arising out of stale claims are not here present since the filing of the suit notified United of the "approximate number" of persons "who may participate in the judgment." Resp. Br. 26. But here respondent failed to point out that the complaint alleged that the claimed class numbered "approximately twenty-seven or twenty-eight other such discharged stewardesses" (Comp. Par. 3, A. 11)—not the 160 claimed by respondent.

5. The Propriety of the Trial Court's Ruling on Class Status.

Respondent describes the class ruling of the trial court as "plainly wrong" (Resp. Br. 20), "obvious error" (Resp. Br. 33), and states that United "does not dispute that the district court erred in refusing to fashion class relief for respondent and others similarly situated." (Resp. Br. 12.) That United did not raise in its petition that part of the majority decision reversing class denial does not mean we agree the district court erred.[8] The issue here is not whether the district court

8. In our opinion, the trial court correctly decided the class issue. Both the Court of Appeals majority and respondent here misstate the basis on which the trial court acted in order to lend credence to their conclusion that the trial court erred. Both the majority and respondent claim the trial court denied class status on the judge's mistaken view that each potential class member had to meet the jurisdictional requirements of Title VII by filing charges with the EEOC. Opinion, A. 109; Resp. Br. 20, n.18.

This is a patent misreading of the trial judge's order of December 6, 1972. If that had been his view of the law, he would not have permitted intervention by any of the 13 former flight attendants he

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erred in this respect; the issue is whether the Court of Appeals had the "power to examine the adverse class ruling" as it concluded it did because it found respondent's petition to intervene to be timely despite *American Pipe*. In fact, the majority of the Court of Appeals was quite cavalier in its consideration of the class question and has created a host of potential administrative problems for the trial court if its decision is permitted to stand. See Pet. Reply to Br. in Opp. to Pet. for Writ of Cert. 2, n.1; Pet. Br. 17, n.12. Whether the trial court was right or wrong in its class determination is not the question here; rather it is whether the Court of Appeals should have decided that question on this appeal.[9]

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did allow in the case, for none had satisfied all and most had met none of the Title VII jurisdictional requirements.

What the trial court did require was a showing of interest in continued employment. The judge had expressed concern about "one way intervention," since the legal issues had long since been settled. "It appears to the court intervenors should be limited to those who protested, did not settle and were truly interested in employment." A. 57. In explication—

> In considering the equities, it does not seem fair and reasonable to this court that it should allow a stewardess terminated prior to November 7, 1968 to intervene here unless she indicated in a timely manner her desire to continue working by taking some affirmative action to protest United's policy or seek reinstatement. A. 60.

This was in December 1972. And yet respondent McDonald—with knowledge that this order excluded her from the case (A. 95)—made no move until three more years had passed.

9. Respondent now appears to contend that the denial of class action by the trial court in *Sprogis* after remand from the Court of Appeals (see Pet. Br. 4-5) was also error. Resp. Br. 6, n.4. If that is respondent's position, then she should have attempted to intervene after the denial of class action status in that case. Ms. Sprogis, represented by the same counsel representing plaintiffs and intervenors in this case, did appeal the final order of June 1974 in that case, but only on the issue of denial of attorney fees. *Sprogis* v. *United Air Lines*, 517 F. 2d 387 (7th Cir. 1975). Pet. Br. 5, n.3.

6. Respondent's Efforts to Make Known Her Claim.

Respondent takes issue with United's assertion that although respondent was terminated in September 1968 she did not make her claim for reinstatement and back pay known until October 1975 when she filed her petition to intervene. This assertion, claims respondent, is without record support. Resp. Br. 10. Respondent attempts to refute this claim by noting that Ms. McDonald's name appeared on a computer printout, and further (and without record support) "McDonald twice contacted United to attempt to regain her position." Resp. Br. 10, n.8.

Respondent's name on a computer printout of former employees conveys nothing about the employee's claim concerning the termination. The printout included the names of employees terminated and resigned between 1966 and 1971 for all kinds of reasons. It was an historical record of the names of past employees, not a grievance roster.

Respondent's assertion that she twice contacted United is particularly distressing. United made the identical claim about respondent's inaction in both brief and argument in the Court of Appeals. During argument, counsel for McDonald asked for and was granted leave to file a post-argument memorandum to this point, and did so. That memorandum, part of the record in the Court of Appeals, made no claim that McDonald ever attempted to contact United prior to the filing of the petition to intervene in October 1975. It merely asserts that United's statement "is unsupported by any record cites and is untrue." United has approximately 50,000 employees. We do not know how we could support the negative of the proposition if indeed we had such an obligation. But Ms. McDonald filed an affidavit in support of her petition to intervene in which she did not allege that she took any affirmative action to assert her claim during the intervening seven year period but rather that she relied on what others were doing. "Since the legality of the no-

marriage policy was being challenged in proceedings that I thought would govern my situation, I did not myself file a discrimination charge against United or grievance under the collective bargaining agreement." A. 95. If McDonald had misspoken or left something out of her affidavit the Court of Appeals gave her the unusual opportunity to correct that omission after argument. She did not. Her present claim that the record does not support our assertion that she took no action until October 1975 is frivolous.

CONCLUSION.

In the final analysis, this Court will advise us whether a potential class member such as respondent McDonald can sit back for seven years after termination of employment, five years after suit has been started, and three years after class denial, waiting until all issues are decided and disposed of, and then come forth to intervene, appeal and start the process all over. To allow her to do so would be to allow again the "one-way intervention" which Rule 23 was designed to eliminate. *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538, 547 (1974.) To permit this would be unfair and prejudicial to a defendant, like United, who should be reasonably able to assume after the passage of so many years that its exposure has ended. The trial court, after the extensive time and effort spent on this case and the related *Sprogis* case, "ought to be relieved of the burden of trying stale claims when [this respondent] has slept on [her] rights." *Burnett* v. *New York Central Rr. Co.,* 380 U. S. 424, 428 (1965).

For the foregoing reasons and for the reasons set forth in our main brief, we respectfully request that the decision of the Court of Appeals be reversed and that the decision of the

district court of October 21, 1975, denying the petition of respondent to intervene, be affirmed.[10]

Respectfully submitted,

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10. Respondent has submitted to the Court by letter dated March 16, 1977, a copy of the decision of the Court of Appeals for the District of Columbia in *Knable* v. *Wilson,* Nos. 75-1655, 1656 (March 9, 1977). There the Court denied to named plaintiffs the right to appeal immediately after class denial. In urging application of the "death knell" doctrine, the named plaintiffs argued that potential class members were now time barred and could not institute their own suits, and that named plaintiffs might prevail individually and satisfactorily on their claims and have no incentive to appeal class denial after judgment. The Court responded by pointing out that there was no "threat of extinction to the named plaintiffs' individual damage claims attributable to a possible time barrier for those who may have slept on their rights." Slip Op. 13. To the second argument—and apparently the point in the decision which induced respondent to submit this case—the Court stated that "the fate predicted for the latter is not inexorable. The jurisprudence of this circuit offers generously the possibility that, on the contingency postulated, unnamed claimants would be allowed to intervene for the purpose of taking the appeal." Slip Op. 14. To the extent this can be construed as other than dictum, the two responses by the Court appear inconsistent. It is apparent that the named plaintiffs had accurately gauged and were concerned about the impact of *American Pipe* resulting from the inaction of "those who have slept on their rights." Further, the cases cited by the Court to the "generosity" of

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the circuit did not involve class action. Two of these have been cited in respondent's brief and are generally distinguished at pages 4-5, *supra. Smuck* v. *Hobson,* 408 F. 2d 175 (D. C. Cir. 1969), held that parents had the right to intervene as of right under Rule 24(a) and appeal an order against the Board of Education affecting district policies where the Board itself decided not to appeal. In *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D. C. Cir. 1944) cert. denied 323 U. S. 777 (1944), a zoning commission whose order affecting a parcel was held void decided not to appeal. The adjoining adversely affected property owners were allowed to intervene as of right. The third cited case, *Zuber* v. *Allen,* 387 F. 2d 862 (D. C. Cir. 1967), recites the formal order without opinion and is somewhat cryptic. It apparently permitted an individual adversely affected by an order against the Secretary of Agriculture to intervene for appeal purposes if the Secretary did not appeal. None of the cited cases concerned Rule 23. If the Court of Appeals intended its comments to be a definitive ruling on the right of potential class members to intervene to appeal class denial after a final order—as it clearly did not since no potential class members were before the Court—then there is another conflict with *American Pipe* along with the decision of the Seventh Circuit in this case.